STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE AMENDED UNFAIR LABOR PRACTICE CHARGE #5-94:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES ASSOCATION, MEA/NEA,
COMPLAINANT
vs.
FLORENCE-CARLTON HIGH SCHOOL & ELEMENTARY DISTRICT NO. 15-6,
DEFENDANT

FINAL ORDER

* *

TO: MAUREEN LENNON
ATTORNEY AT LAW
GARLINGTON, LOHN & ROBINSON
199 WEST PINE
MISSOULA MT 59801

KARL J. ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

* *

On July 14, 1994, Joseph V. Maronick, Hearing Examiner for the Department of Labor and Industry, issued his FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER for the above captioned matter. On August 1, 1994, Don K. Klepper, filed RESPONDENT'S EXCEPTIONS TO FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER. COMPLAINANT'S APPEAL BRIEF was filed by Karl J. Englund, Attorney for Complainant on October 17, 1994. Order.

Oral argument was scheduled before the Board of Personnel Appeals on January 25, 1995. Maureen Lennon, Attorney, presented oral argument on behalf of the Defendant/Appellant. Karl J. Englund, Attorney, presented oral argument on behalf of the Complainant/Respondent/Appellant.

After review of the record, consideration of the parties' oral arguments and briefs, the Board enters the following order:

1. IT IS HEREBY ORDERED that the Appeal filed by DEFENDANT/APPELLANT is hereby denied.

2. IT IS HEREBY ORDERED that the Board adopts as its own the FINDINGS OF FACT; CONCIDSIONS OF LAW; AND RECOMMENDED ORDER of Hearing Examiner Joseph V. Maronick dated July 14, 1994.

DATED this 13th day of February, 1995.

BOARD OF PERSONNEL APPEALS

By _____
WILLIS M. MCKEON
CHAIRMAN

Board members Schneider and Henry concur.

* *

Board members Talcott and Hagan dissenting.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify a true and correct copy of this document to the following on the 16th day of February, 1995:

MAUREEN LENNON, ATTORNEY
GARLINGTON, LOHN & ROBINSON
199 WEST PINE
MISSOULA MT 59801

KARL J. ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

* *

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 5-94

FLORENCE-CARLTON CLASSIFIED EMPLOYEES ASSOCIATION, MEA/NEA, Complainant,	
-vs-	FINDING OF FACT; CONCLUSIONS OF LAW; RECOMMENDED ORDER
FLORENCE-CARLTON ELEMENTARY AND HIGH SCHOOL DISTRICT 15-6, Defendant.	

* * * * * * * * * *

I. INTRODUCTION

Florence-Carlton Classified Employees Association (Complainant) filed an unfair labor charge against the Florence-Carlton Elementary and High School District 15-6 (Defendant) on September 1, 1993 alleging the Defendant violated Section 39-31-401(1), and (5), MCA, by subcontracting out Complainant association work without proper bargaining. On November 15, 1993, the Defendant denied any violation as alleged.

A hearing was held in this matter in Florence, Montana on April 14, 1994. Parties present, duly sworn and offering testimony included Eleanor McCullough, Sara Perry, Dr. Ernst Jean, and Laura Risinger. Complainants were represented by Counsel Karl Englund and Respondents were represented by Dr. Don Klepper. Also present were observers Kay Winter and Nancy Newall. Documents submitted into the record by joint stipulation were Joint Exhibits A, B and C. Administrative

notice of the September 3, 1993 complaint, the November 15, 1993 response and the November 23, 1993 investigation report was also taken. Complainant/Defendant Post-Hearing Briefs were received May 16, 1994 and Complainant reply brief received May 26, 1994.

II. FINDINGS OF FACT

1. The Defendant's food service program had been, prior to the start of the 1993-'94 school term, operated by five Complainant unit members. Based upon economic considerations the Defendant without specific or formal notification to the Complainant, subcontracted out the food service program thereby eliminating five unit member positions.

2. In the summer of 1993, the Defendant's District Superintendent informed the Complainant unit association president the hot lunch program was being considered and discussed. Another meeting of the superintendent and the association president occurred in August, 1993. At that meeting the superintendent advised the association president the lunch program would be subcontracted out pursuant to School Board action taken the day before. The five unit members were thereafter terminated.

3. The school district practice had not been to contract out work. The Complainant contended they did not waive their opportunity or responsibility to bargain the subcontracting decision because they were only advised the subcontracting had

been done and the unit members work thereafter would be completed by subcontract employees.

4. The Association did not at anytime request bargaining over the contracting of the lunch program. The Defendant, based upon "management rights" contracted the lunching and considered the subcontracting action under the collective bargaining agreement as allowed by the contract. The management rights contract language reads as follows:

> The association recognized the prerogatives of the employer to operate and manage its affairs in such areas as but not limited to:
>
> 1. Direct employees;
> 2. Hire, promote, transfer, assign, and retain;
> 3. Relieve employees from duties because of lack or work, or funds or under conditions where continuation of such work would be inefficient and nonproductive;
> 4. Maintain the efficiency of government operations;
> 5. Determine the methods, means, job classifications and personnel by which government operations are to be conducted;
> 6. Take whatever actions maybe necessary to carry out the missions of the agency in situations of emergency;
> 7. Establish the methods and processes by which work is performed.

5. The Defendant contended the subcontracting action did not demonstrate "good/bad faith" standards directed upon the standard established in Allis Chalmers Manufacturing Company 39 LA 1213, 1219 (Smith, 1992). The standard established four indices to established bad faith actions as follows:

1. Negotiate classified work while withholding contemplated change which will eliminate such work.

2. Use of subcontracting agents used substantive to subcontract employees becomes employers/employees.

3. Commingling of differently paid subcontractor employees with other employer/employees performing the same kinds of work.

4. Subcontracting out the work was intended to weaken the union or eliminate employment.

6. All contractual rights including bumping of terminated food service employees were preserved under the contract terms. The Defendant, therefore, pointed out, in post-hearing brief that the bumping ability or term had been "bargained to deal with that kind of management decision".

7. The Parties agreed that the standards set by the National Labor Relations Board applied to this case. In the case of Town and Country Manufacturing, 13 NLRB 1022 (1972), enforced, 316 F.2d 846 (5th Cir. 1963), Fiberboard Paper Products Corporation 130 NLRB 1558 (1961), supplemented, 138 NLRB 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), AFF'D, 379 U.S. 203 (1964) Westinghouse Electric Corp., 150 NLRB 1574 (1965), and adopted by the Board of Personnel Appeals in Teamsters Local 190 v. Yellowstone County School District No. 26, ULP No. 9-83. The standard established four indices to identify bad faith action as follows:

1. Negotiate classified work while withholding contemplated change which will eliminate such work.

2. Use of subcontracting agreements used as a subterfuge to subcontractor employees because become employers/employees.

3. Commingling of differently paid subcontractor employees with other employer/employees performing the same kinds of duties.

4. Subcontracting out the work was intended to weaken the union or eliminate employment.

8. The Board and County have concluded that subcontracting of collective unit work is a mandatory subject of bargaining and bargaining over a decision to subcontract out not necessary only if the following factors are present:

1. The subcontracting is motivated solely by economic reasons;

2. It is the employer's custom to subcontract various kinds of work;

3. No substantial variants is shown in kind or degree from the established past practice of the employer;

4. No significant determent results to employees in the unit; and the union had the opportunity to bargain about changes in existing subcontracting practices at a general negotiation meeting.

III. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this complaint under Sections 39-31-401, 103(7), MCA and under Implementation Rules of Sections 24.26.601 and 24.26.680-685 ARM.

2. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as the state act is so similar to the Federal Labor Management Relations Act, State ex. rel.Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local No. 45 v. State ex. rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (Young III), 221 Mont. 13, 683 P.2d 185, 119 LRRM 2682 (1984.

3. The record shows that the subject matter involved in this case is subcontracting of unit work. This is a mandatory subject of bargaining.

4. The factors identified in Westinghouse Electric Corporation must all be identified and satisfied in order to avoid the necessity of negotiation prior to subcontracting work. While the decision to subcontract out the lunch program may have been based on economic reasons the other four required factors were not present. The Defendant did not have the practice of subcontracting out various kinds of work, there was a substantial variance in the past practice of the Defendant, there was significant detriment, lost of four unit jobs and the union did not have an opportunity to bargain the changes prior

to there being completed. Based on these conclusions it is found that the Defendant did fail to bargain in good faith and violated Section 39-31-401(1) and (5), MCA.

Therefore, it is concluded that the Defendant must reinstate with full back pay and benefits plus interest all unit members adversely affect by the subcontracting.

IV. SPECIAL NOTE

In accordance with Board Rule ARM 24.26.684 the above **RECOMMENDED ORDER** shall become the **FINAL ORDER** of this Board unless written exceptions are filed within twenty (20) days after service of these **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER** upon the Parties.

Entered and Date this _____ day of July, 1994.

BOARD OF PERSONNEL APPEALS

By:_____
Joseph V. Maronick
Hearing Officer

* * * * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Karl J. England
401 N. Washington St.
PO Box 8142
Missoula, MT 59807

Dr. Don K. Klepper
The Klepper Company
PO Box 4152
Missoula, MT 59806

DATED this _____ day of July, 1994.

By:_____